84-1279

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF DELAWARE,

Petitioner,

v.

ROBERT E. VAN ARSDALL,

Respondent

On Petition for Writ of Certiorari to the Supreme Court of Delaware

PETITION FOR WRIT OF CERTIORARI

Charles M. Oberly, III
Attorney General of the State of Delaware

Gary A. Myers
Counsel of Record

John A. Parkins, Jr.
Chief, Appeals Division

Loren C. Meyers
Deputy Attorney General

DELAWARE DEPARTMENT OF JUSTICE
1. S. Race Street
P.O. Box 373
Georgetown, DE 19947
(302) 856-5353

Dated: February 7, 1985

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

Question Presented

Under the Confrontation Clause, when a prosecution witness relates facts which the defendant has conceded, does an erroneous restriction of the defendant's cross-examination of that witness require reversal without consideration of the harmlessness of the error?[1]

---

1. The principal parties in the Delaware Supreme Court were the STATE OF DELAWARE, Petitioner, and ROBERT E. VAN ARSDALL, Respondent. Additionally, the Delaware Supreme Court permitted the GANNETT COMPANY, INC., publisher of the Wilmington, Delaware newspapers *The Morning News* and *The Evening Journal*, to intervene as a party. Because the issue in which GANNETT was interested, the trial court's refusal to grant the defendant's request to close the pretrial proceedings, was not resolved by the Delaware Supreme Court and is not presented by this petition, GANNETT has not been named as a party in this Court.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases: Page

Cases: Page

Statutes and Court Rules:

Other Authorities:

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF DELAWARE,

Petitioner,

v.

ROBERT E. VAN ARSDALL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Delaware

The State of Delaware, petitioner, requests that a writ of certiorari issue to review the judgment and opinion of the Delaware Supreme Court entered November 19, 1984.

Opinion Below

The opinion of the Supreme Court of Delaware dated November 19, 1984 is not yet reported. It is reproduced in the Appendix to this Petition beginning at A-1.

Jurisdictional Grounds

The judgment of the Delaware Supreme Court, reversing Van Arsdall's murder and possession of a deadly

weapon convictions, was entered on November 19, 1984.[2] A timely motion for a rehearing before the Delaware Supreme Court, sitting *en banc*, was denied December 12, 1984. App. at B-1. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). Although the judgment below vacated the convictions and remanded for a new trial, the judgment is final for purposes of review by this Court because Delaware law would preclude, in the event of an acquittal upon retrial, a subsequent prosecution appeal of the federal issue now presented. *Florida v. Meyers*, ___U.S. ___, 104 S.Ct. 1852, 1853 n. * (1984) (per curiam); *California v. Stewart*, 384 U.S. 436, 497, 498 n. 71 (1966) (decided with *Miranda v. Arizona*).

CONSTITUTIONAL PROVISION INVOLVED

1. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

2. Although not directly involved in the question presented, the following provisions of the Delaware code were involved in the prosecution and are reproduced in the Appendix at C-1. 11 Del. C. §§271(2)(b), 636(a)(1), 1447 (1979); 21 Del. C. §4149 (1981).

STATEMENT OF THE CASE

A jury found Robert A. Van Arsdall guilty of murdering Doris Epps in the apartment of his friend, Daniel Pregent, in the early morning hours of January 1, 1982.[3]

---

2. Delaware appellate practice does not provide for any separate document known as a judgment. Rather the clerk enters a docket notation based on the final paragraph of the written opinion.

3. 11 Del. C. §636(a)(1) (1979) [App. C-1]. Van Arsdall was also convicted of possessing a deadly weapon, a knife, during the murder. 11 Del. C. §1447 (1979) [App. C-1]. The position of the prosecution was that Van Arsdall either singly, or jointly with Pregent, killed Epps. 11 Del. C. §271(2)(b) (1979) (accomplice liability) [App. C-1].

4. Citations to the trial transcript (Tr.) will be by volume and page number, followed by the witness' name. The prosecution's trial exhibits shall be cited as "S. Exh."

On appeal, the Delaware Supreme Court determined that the trial court had impermissibly, under the Confrontation Clause, restricted the defense's cross examination of a prosecution witness, Robert Fleetwood. Refusing to make any inquiry concerning whether Fleetwood's testimony was a crucial part of the prosecution or merely echoed facts conceded by the defense, the Delaware court then reversed the convictions, holding that the Confrontation Clause error could never be found harmless. The question presented by this petition is whether the Clause requires such a rule of automatic reversal.

1. The Killing

Pregent and Fleetwood lived across the hall from each other in a small apartment house in Smyrna, Delaware.[4] On December 31, 1981, they held an informal New Year's Eve party, with people mingling in their apartments all during the day. In the early afternoon, Doris Epps appeared, inquiring about renting Fleetwood's soon to be vacated apartment. Epps returned later and joined the party. At about the same time, Van Arsdall, an acquaintance of both Pregent and Fleetwood, arrived at the party, accompanied by several friends. He remained for a short time and then left. Tr. II91-94, 100-01 (Crain); III41-47 (Fleetwood); IV10-12 (Meinier).

As the party continued into the evening, it lost much of its jovial nature. Pregent quarreled with one female guest and several items were broken in Fleetwood's apartment. Tr. II95, 108-09 (Crain); III62-63 (Fleetwood); IV54 (Meinier). By 10:30 p.m., Epps had passed out, and Pregent, assisted by Robert Crain, carried her into Pregent's sparsely furnished apartment and laid her on a

convertible sofa-bed in the living room. Soon afterwards, Fleetwood "closed" the party, ordering everyone except his friends Alice Meinier and Mark Mood to leave his apartment. After the others had left, the three continued drinking in Fleetwood's apartment. Tr. III48-49 (Fleetwood); IV56 (Meinier).

Sometime after 11:00 p.m., Fleetwood walked across the hall, and momentarily peeking his head in the doorway to Pregent's apartment, saw Van Arsdall sitting on the corner of the sofa-bed. Pregent's feet, hanging over the side of the bed, were visible next to him. Tr. III50-52 (Fleetwood). At 11:53 p.m., with Fleetwood falling asleep, Menier walked across the hallway and looked at the clock in Pregent's kitchen. The living room was dark. Tr. IV14 (Meinier).

About one hour later, with Fleetwood still asleep, Meinier heard a knock at Fleetwood's door. When she opened the door, there stood Van Arsdall holding a bloody knife, his shirt splattered and his hands covered with blood. Tr. IV17-21 (Meinier).[5] Van Arsdall muttered that "he had gotten in a fight" but that "I got them back." Tr. IV19-20 (Meinier). Told by Van Arsdall that "there's something wrong across the hall," Meinier looked into Pregent's apartment and saw Epps' body on the kitchen floor.

When the police arrived several minutes later, they found Epps' disemboweled and mutilated body lying on the kitchen floor with the floor and surrounding furnishings splattered with blood and tissue. In the darkened living room, they found Pregent wrapped in a blanket lying on the blood splattered sofa-bed. Tr. IV129-30 (Timmons).

While the police continued their investigation, Van Arsdall remarked that he "didn't think it would go like this." Tr. VII70-72, 77 (Montgomery). Later that morn-

5. Clinging to Van Arsdall's blood covered watch was a piece of human tissue.

ing, in tape-recorded statements, both Van Arsdall and Pregent told the police that Van Arsdall had returned to Pregent's apartment between 11:00 p.m. and midnight and that the two had talked for a while, first in the kitchen and then in the living room, until Pregent fell asleep next to Epps on the sofa-bed. Then Van Arsdall laid down on some cushions which had been placed on the floor near the sofa-bed. S. Exh. 73 at 2, 9-10 (Van Arsdall); 75 at 4-6, 8-9 (Pregent). Van Arsdall denied any knowledge of how the killing occured, indicating he stepped out into the hallway for a breath of fresh air and had discovered Epps' body when he returned to the apartment. S. Exh. 73 at 2, 4, 12-13.[6]

Two days later, Van Arsdall told the police that he had lied in portions in his first statement in order to "cover up" for his friend Pregent. He repeated that he had returned to Pregent's apartment at around 11:30 p.m. and that, with Epps asleep on the sofa-bed, the two had talked in the living room. However, he now said that as he began to fall asleep on the cushions, he had heard noises on the bed and had then awoke to see Pregent dragging Epps towards the kitchen. When he arose to investigate, the smaller Pregent had struck him and had then begun stabbing Epps. As he sought to pull Pregent away, Pregent pushed him into the bloodied kitchen and struck him again. After Pregent washed his hands and returned to the bed, Van Arsdall said he removed the knife from Epps' body and went across the hall. S. Exh. 74.[7]

6. Van Arsdall said that he had met Menier in the hallway and then returned to discover the body, becoming splattered with blood as he tried to feel Epps' pulse. He denied having the knife and said he had lost his watch earlier that evening. Pregent told the police that after talking with Van Arsdall in the living room, he had fallen asleep on the bed and the next thing he remembered was being awakened by the police. S. Exh. 75 at 2, 10.

7. Pregent, in a second statement, continued to maintain that he fell asleep after talking to Van Arsdall and had no knowledge of the killing. S. Exh. 72.

2. The Trial

Van Arsdall was tried first for the murder of Epps. In his opening remarks, before any evidence had been presented, defense counsel framed the issues for the jurors. Emphasizing that Van Arsdall would testify, counsel told the jury that the defense did not dispute that Van Arsdall had returned to Pregent's apartment at 11:30 p.m., that he had been present in the apartment when Epps was killed, and that he had carried a bloody knife into Fleetwood's apartment. Tr. II30, 38, 40-41. Counsel said the defense intended to show that Pregent alone, had, for some unknown reason, killed Epps. Tr. II39-41.

The prosecution's case was composed of three types of evidence. First, several of the party-goers, including Fleetwood and Meinier, and the responding police officers testified concerning the activities at the party, the scene after the killing, and the statements of Van Arsdall. Secondly, without objection,[8] Van Arsdall and Pregent's post-arrest statements were played for consideration by the jury. Finally, the State called a forensic expert, who demonstrated to the jury that based on an analysis of the nature and type of the bloodstains at the crime scene and on Van Arsdall's clothing, that Epps had been originally attacked and stabbed while she was on the sofa-bed; that Van Arsdall had been facing, in standing position, a profusely bleeding arterial wound; and that he had kneeled in a large pool of blood. Tr. VI56-60, 88-94, 100-04, 108-09 (Lee).

Fleetwood testified concerning the New Year's Eve party events and his momentary glimpse of Van Arsdall sitting on the bed next to Pregent's feet. Near the end of

8. Prior to trial, Van Arsdall had filed an unsuccessful motion to suppress his first statement as involuntary and violative of a state prompt arraignment requirement. The supression issue was not pressed on appeal. He never lodged any objection to the admissibility of his second statement. Although Pregent did not testify, Van Arsdall made no objection to the introduction of his statements.

his cross-examination, defense counsel sought to have Fleetwood admit that eight months after the murder, he had been arrested for walking drunk on a highway,[9] and that the charge had been dismissed after he had indicated that he would speak to the prosecutor the next day concerning his recollection of the killing. Tr. III69, 85-86. The trial judge precluded the inquiry. Tr. III88.[10] Similarly, the trial judge disallowed any cross-examination of Fleetwood concerning whether he had been questioned by police about an unrelated homicide occurring after the Epps murder.

As his counsel had indicated, Van Arsdall took the stand and repeated the chronology of events that he had given in his second statement, telling the jury that after his return at around 11:30 p.m., Pregent and he had talked momentarily in the kitchen and then moved into the living room, where as he sat on the corner of the sofa, they had a drink and continued to talk. He then repeated his story that after laying on the cushions he had been awakened to find Pregent stabbing Epps and had unsuccessfully attempted to intervene. Tr. X41-46, 49-57.[11]

In his summation, defense counsel told the jury that the defendant did not dispute that he had returned to Pregent's apartment before midnight, that he had sat on the bed in the living room, and that he had been present while Epps was killed. Rather, the only issue was whether

9. 21 Del. C. §4149 (1981) [App. at C-1]. The offense is a misdemeanor.

10. The trial judge, before ruling, allowed defense counsel to question Fleetwood outside the presence of the jury concerning the arrest and dismissal. Fleetwood said that he would have gone to the prosecutor's office even if the charge had not been dismissed and that his present testimony related the same facts he had told the police the night of the killing.

11. For the first time, Van Arsdall said that Epps and he had had sexual intercourse on the bed while Pregent was out of the room. This trial revelation occurred after a pre-trial fiber and hair analysis disclosed Epps' body and pubic hair on his pants and underclothing.

he had participated in the killing. Tr. XI32-33, 78.[12] The jury found Van Arsdall guilty.[13]

3. The Delaware Supreme Court and the Automatic Reversal Rule

The Delaware Supreme Court reversed. Initially, scrutinizing only the nature of the excluded impeachment evidence, the court held that the trial judge's ruling precluding cross-examination of Fleetwood concerning his misdemeanor arrest violated the Confrontation Clause because it "prevented the jury from considering facts from which it could have drawn inferences about [his] testimonial reliability." App. at A-5.

The Delaware Court then turned to the State's argument that the Confrontation Clause error was harmless beyond a reasonable doubt because Fleetwood's testimony was neither crucial nor devastating. Instead, his evidence was merely cumulative of, and mirrored, what Van Arsdall repeatedly had conceded in his post arrest statements and his trial testimony, i.e., that he had been in Pregent's apartment with Pregent after 11:30 p.m. Brief for Appellee (State of Delaware) at 13-16, *Van Arsdall v. State*, No. 346, 1982 (Del. Nov. 19, 1984).

While not disputing the conclusion that Fleetwood's testimony, in hindsight, was cumulative in nature and hence unimportant, App. at A-6,[14] the Delaware court

12. In his closing argument, defense counsel emphasized that Fleetwood's testimony only proved what Van Arsdall had never denied, that he was in Pregent's apartment before Epps was murdered. Tr. XI42. Indeed, counsel used other portions of Fleetwood's testimony, which indicated that Pregent had earlier in the evening punched a hole in the hall, to support the defense's position that Pregent acted alone. Tr. XI42-43.

13. At a subsequent trial, Pregent was acquitted.

14. The opinion never states that Fleetwood's testimony was crucial to the prosecution or had any damaging effect. Indeed, the nature of the witness' testimony is not considered by the Delaware court when determining whether a Confrontation Clause error has occurred. App. at A-4-A-7.

refused to even consider the prosecution's position. Rather, again focusing on the nature, and not the effect, of the error, the court held that because "the defendant was subjected to a blanket prohibition against exploring potential bias through cross-examination," the trial court's evidentiary ruling was a "*per se* error" under the Confrontation Clause, which automatically required reversal. App. at A-7.[15]

Reasons for Granting the Writ

1. The Automatic Reversal Rule of the Decision Below Conflicts With Decisions of Other Courts of Appeals and State Supreme Courts

In the decision below, the Delaware Supreme Court held, as a matter of federal constitutional law, that an erroneous restriction of the defendant's cross-examination of any prosecution witness can never be held harmless.[16] The opinion is the latest addition to a con-

15. The structure of the Delaware court's opinion clearly indicates that it was attempting to divine the appropriate federal harmless error rule and not crafting a standard under any applicable state rule or statute. First, no reference is made to the Delaware harmless error rule, Del. Super. Ct. Crim. R. 52(a). *See Michigan v. Long*, ___ ---U.S. ____, 103 S. Ct. 3469, 3474-78 (1983). Secondly, the *per se* rule adopted is supported by a reference to an opinion of the District of Columbia Court of Appeals. Finally, the court states that its rule is meant to be "consistent with *Davis v. Alaska*, 415 U.S. 308 (1974)." *Cf. Connecticut v. Johnson*, 460 U.S. 73, 81 n. 9 (plurality opinion), 90-93 (Powell, J., dissenting) (1983) (state court, in an opinion lacking reference to state policy or statute, was applying federal harmless error rule).

16. For the purpose of review by this Court, Delaware will not contest the decision of the court below that the trial court erred when it prevented Van Arsdall from questioning Fleetwood about the prior misdemeanor arrest and subsequent dismissal. However, the past opinions of this Court reflect the ambivalent relationship between the Confrontation Clause's substantive guarantee and the notion of harmless error in a particular prosecution. *Compare Parker v. Randolph*, 442 U.S. 62, 72-73 (1979) (plurality opinion) and *Dutton*

fusing morass of lower court opinions which have sought, often with conflicting results, to chart the scope of appellate remedies in cases involving the Confrontation Clause. After *Davis v. Alaska*, 415 U.S. 308 (1974) underscored that each trial court ruling concerning the scope of cross examination may implicate constitutional values, appellate courts have struggled to determine the appropriate relationship between the Confrontation Clause errors described in *Davis* and the guidelines for harmless error analysis described in *Chapman v. California*, 386 U.S. 18 (1967).

In *Chapman*, this Court rejected the contention "that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." 386 U.S. at 21-22. Rather, *Chapman* emphasized that a trial error, including one of constitutional magnitude, may be found harmless, so as not to warrant reversal, when the appellate court can say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24.

Seven years later in *Davis*, this Court held that if the testimony of a witness provides a "crucial link in the proof" of the crime so that "[t]he accuracy and truthfulness of his testimony were key elements in the State's case," *Davis*, 415 U.S. at 317, a trial court may not, consistent with the Confrontation Clause guarantee, prevent the defendant from attempting to impeach the witness by showing possible bias or interest arising from a "relationship" with the prosecution. While emphasizing that in the case before it there was "real possibility" that the excluded impeachment evidence would have done "[s]erious dam-

NOTES *(Continued)*

v. Evans, 400 U.S. 74, 87-88 (1970) (plurality opinion) (no Confrontation Clause violations because hearsay statements were not "crucial" or "devastating") *with Parker*, 442 U.S. at 77, 78-79 (Blackmun, J., concurring) and *Evans*, 400 U.S. at 90, 92-94 (Blackmun, J., concurring) (Confrontation Clause violations but errors harmless).

age to the strength of the State's case," *Davis*, 415 U.S. at 319, this Court noted that the denied right of effective cross-examination was "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis*, 415 U.S. at 318 (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)).[17]

Relying on that language, several courts, including the court below, have held that once an appellate court determines that the trial court erroneously restricted cross-examination, no harmless error analysis is permissible.[18] Those courts view Confrontation Clause errors as falling within the category, suggested in *Chapman*, 386 U.S. at 23 & n. 8, of generically harmful violations which require reversal without regard to the facts or circumstances of the particular case. *United States v. Uramato*, 638 F.2d 84, 87 (9th Cir. 1980); *Chipman v. Mercer*, 628 F.2d 528, 533 (9th Cir. 1980); *State v. Parillo*, 480 A.2d 1349, 1357-59 (R.I. 1984).[19] *See generally* 3A C. Wright, *Federal Practice and Procedure* §855 at 329-30 (2nd ed. 1982).

17. The language quoted from *Brookhart* had, in that earlier case, been lifted, as a concession, from a party's brief.

18. Despite its two tiered structure, the Delaware rule states a rule of automatic reversal for all Confrontation Clause errors. The Delaware approach purports to allow an inquiry into harmless error if, from the permitted cross examination, "the jury [had] sufficient information from which to infer bias." App. at A-7. However, at the same time, the Delaware court determines whether an error occurred by ascertaining whether the jury had been "exposed to facts sufficient for it to draw inferences as to the reliability of the witness." App. at A-5. Thus, if sufficient information had been presented, no constitutional violation occurred.

19. *Accord Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 427 (1984) (No. 84-48). However, the Ninth Circuit has itself been in disharmony about an automatic reversal rule. *See, e.g., United States v. Price*, 577 F.2d 1356, 1361-64 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979) (rejecting rule); *United States v. Williams*, 668 F.2d 1064, 1070 n. 14 (9th Cir. 1981) (noting division).

Other courts have declined to read *Davis* as articulating an automatic reversal rule and have held that erroneous restrictions on cross-examination may be found harmless. *United States v. Gambler*, 662 F.2d 834, 840-42 (D.C. Cir. 1981); *Kines v. Butterworth*, 669 F.2d 6, 11-13 (1st Cir.), *cert. denied*, 456 U.S. 980 (1981); *United States v. Smith*, 748 F.2d 1091, 1096 (6th Cir. 1984); *United States ex. rel. Scarpelli v. George*, 687 F.2d 1012, 1013-14 (7th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Commonwealth v. Wilson*, 407 N.E. 2d 1229, 1247 (Mass. 1980); *Ransey v. State*, 680 P.2d 596, 597-98 (Nev. 1984); *State v. Pearce*, 414 N.E. 2d 1038, 1043-44 (Ohio 1980); *State v. Patterson*, 656 P.2d 438, 439 (Utah 1982).[20] Several courts view the harmless error analysis particularly appropriate in those cases where the appellate court, vested with the hindsight view not generally available to the trial court, can see that the witness did not provide crucial testimony. *United States v. Duhart*, 511 F.2d 7, 9 (6th Cir.), *cert. dismissed*, 421 U.S. 1006 (1975); *People v. Boyce*, 366 N.E.2d 914, 920-21 (Ill. App. 1977). Finally, one court has crafted a unique rule, mandating reversal for *in limine* restrictions on cross-examination but permitting the prosecution to show harmless error where the jury has garnished, from the allowed cross-examination, sufficient information to infer bias. *Springer v. United States*, 388 A.2d 846, 855-56 (D.C. App. 1978).[21]

20. The Fourth and Fifth Circuits have applied harmless error analysis while noting that language in *Davis* does suggest an automatic reversal rule. *Hoover v. State of Maryland*, 714 F. 2d 301, 306 & n. 4 (4th Cir. 1983); *Carrillo v. Perkins*, 723 F. 2d 1165, 1170-73 (5th Cir. 1984).

21. The divergence of approaches, resulting in different conclusions, is most starkly emphasized by the opinions by the two courts exercising jurisdiction in the District of Columbia. Thus, the District of Columbia has applied its *per se* rule requiring reversal where the trial court precluded cross-examination inquiry into the existence of a pending lawsuit between the complaining witness and the defendant. *Webb v. United States*, 388 A.2d 857, 859 (D.C. App. 1978). *But see Beynum v. United States*, 480 A.2d 698, 707 (D.C. App. 1984). In contrast, the Court of Appeals for the District of Columbia Circuit has held that the total denial of any inquiry into such a lawsuit, offered to prove bias, is an error which may be subjected to a *Chapman* analysis and, in the context of the case, be found harmless. *Gambler*, 662 F.2d at 842.

Yet, the Delaware court below stakes out a *per se* reversal position beyond any previously established. Because the Delaware court does not, in its criteria for determining the substantive violation, App. at A-5, consider whether the witness provided crucial testimony, the Delaware approach requires reversal for an erroneous restriction no matter how insignificant the witness' testimony. As such, the Delaware view stands in direct conflict with the decision in *United States v. Duhart*, 511 F.2d 7 (6th Cir. 1975), where the district court, as had the Delaware trial court, prohibited the defendant from cross examining a prosecution witness about other criminal charges which had been lodged against him. The Court of Appeals had little hesitation in finding that the restriction erroneous. Yet, it refused to embrace the notion that, in all cases, "the complete denial of access to an area which is properly the subject of cross-examination . . . cannot be considered harmless." 511 F.2d at 7. Instead, the court concluded that because the error involved a "merely buttressing prosecution witness" who did not present any testimony critical to the determination of guilt, it was harmless.

2. The Automatic Reversal Rule of the Decision Below Conflicts With Decisions of this Court

The prosecution urged that the Confrontation Clause error was harmless because the witness' not fully cross-examined testimony was merely cumulative or duplicative of facts consistently conceded by the defendant in his unchallenged pre-trial statements and his trial testimony. The Delaware court below instead applied a rule of automatic reversal. The opinion of that court runs di-

rectly contrary to a consistent stream of opinions of this Court which have not only generally rejected a rule of automatic reversal for Confrontation Clause errors, but which have utilized the same "cumulative evidence" rationale to determine harmlessness as the prosecution urged in the Delaware court.[22]

Eighty-five years ago, during the era of automatic reversal for constitutional violations, this Court, in *Motes v. United States*, 178 U.S. 458 (1900), ruled that the Confrontation Clause had been violated when a highly incriminatory pre-trial statement made by a missing, escaped co-conspirator had been admitted at trial. Although as a result of the error, the jury had heard "testimony" of a witness totally immune from trial cross-examination, this Court found the error harmless in the case of one defendant because the co-conspirator's recitation merely duplicated his own trial testimony in which he admitted his participation in the crime. To reverse for a Confrontation Clause error in those circumstances "would be trifling with the administration of the criminal law." 178 U.S. at 475.

Chapman did not alter the principles announced in *Motes*. Thus, in *Harrington v. California*, 395 U.S. 250 (1969), the jury had heard the pre-trial statements of two non-testifying co-defendants implicating Harrington by placing him at the scene of the robbery. While finding that the admission of the statements at a joint trial was error under the Confrontation Clause, this Court affirmed the conviction, refusing to adopt for such errors "the minority view in *Chapman* that a departure from constitutional procedures should result in automatic reversal."

22. The cases described below were cited to the Delaware Supreme Court. Brief for Appellee (State of Delaware) at 13-16, *Van Arsdall v. State*, No. 346, 1982 (Del. Nov. 19, 1984). The opinion below does not mention any of them. The "cumulative evidence" approach to a finding of harmless error is extensively analyzed in Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of A Rationale*, 125 U. Pa. L. Rev. 15 (1976).

395 U.S. at 254 (citation omitted). Instead, after reviewing all of the evidence presented at trial, the Court concluded that the error could not have contributed to the verdict, because the co-defendants' statements merely echoed what Harrington had admitted in his own unchallenged pre-trial statement which had also been presented to the jury. This approach to Confrontation Clause errors has been consistently re-affirmed. *See Brown v. United States*, 411 U.S. 223, 231 (1973) ("The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury."); *Schneble v. Florida*, 405 U.S. 427, 431 (1972) (the "inadmissable statements . . . at most tended to corroborate certain details of petitioner's comprehensive confession."). *Accord Parker v. Randolph*, 442 U.S. 62, 77, 80-81 (1979) (Blackmun, J., concurring).[23]

The decision below simply ignores the command of *Harrington*, including its common sense view of when unimpeached evidence may be said not to have contributed to the jury's verdict.[24] Ironically, in so doing, the

23. Indeed, in the context of violations of other constitutional provisions which may support a rule of automatic reversal, an exception has been recognized where the error relates to evidence, the truth of which the defendant has conceded and thus removed from dispute. Thus, the use of a statement taken in violation of the right of counsel, *Chapman*, 386 U.S. at 23 n. 8, may be harmless where the facts related have been exposed to the jury through other unchallenged confessions. *Milton v. Wainwright*, 407 U.S. 371, 373-74 (1972). Similarly, an erroneous presumptive jury instruction may be harmless if the defendant has conceded the existence of the element to which it relates. *Connecticut v. Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion).

24. The Confrontation Clause violations in those cases involved error under *Bruton v. United States*, 391 U.S. 123 (1968). Yet, while *Bruton* involved the use of a non-testifying co-defendant's statement, the Confrontation Clause error is no different than a restriction on cross-examination. In both cases, the witness is not available for cross-examination. In *Bruton* cases, the witness is unavailable

Delaware court creates a topsy-turvy approach to reversals for Confrontation Clause violations. Errors in admitting testimony, totally immune from cross-examination, may be found harmless under *Harrington*. However, errors that occur when the live witness has been subjected to some cross-examination require reversal.

The lower courts are in disarray concerning the role of harmless error where cross-examination has been restricted. If a rule of automatic reversal, as expansively defined by the Delaware court, continues to be seen as the remedy compelled by the federal constitution, the lower appellate courts will quickly retreat to once again becoming "impregnable citadels of technicality," "unable to conserve [their] resources . . . by cleans[ing] the judicial process of prejudicial error without becoming mired in harmless error." *United States v. Hasting*, ___ U.S. ___, 103 S.Ct. 1974, 1980-81 (1983) (quoting R. Traynor, the Riddle of Harmless Error, 14, 81 (1970)). The decision of the Delaware Supreme Court, which simply articulates a rule of automatic reversal, presents the clear opportunity for this Court to hold that the Confrontation Clause does not require the states to ignore the important jurisprudential and societal policies upon which the harmless error rule is based.[25]

NOTES *(Continued)*

due to the prosecutor's and judge's choices not to sever; in the latter cases, the witness is unavailable because of the prosecutor's objection and the trial judge's evidentiary ruling.

25. Even in situations where the prosecutor has offered to the jury testimony he knew or should have known was perjured, this Court has declined to hold that a new trial is automatically required. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Thus, notwithstanding the egregious nature of the prosecutor's conduct and its attendant effect on the fact-finding function of trial, this Court employs what is essentially a harmless error test. The same test is surely applicable when the prosecutor's conduct is merely the lodging of an evidentiary objection.

3. This Petition Should be Held Pending a Decision in *United States v. Bagley*, No. 84-48

The State of Delaware suggests that it may be appropriate to hold this petition pending this Court's decision in *United States v. Bagley, cert. granted*, ___ U.S. ___, 105 S.Ct. 427 (1984) (No.84-48).

Although *Bagley* involves the prosecutor's failure to furnish to the defendant evidence which he may have been able to use to impeach several government witnesses, the Court of Appeals utilized, in part, the Ninth Circuit's rule of automatic reversal for Confrontation Clause errors to overturn the conviction, despite a conclusion by the trial judge that the underclosed impeachment evidence would have not affected the verdict. *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983).

The Solicitor General in *Bagley* advances the same position as that urged by the State of Delaware in this case: that erroneous restrictions on the defendant's ability to cross-examine witnesses does not automatically require reversal. Brief for the United States at 14-17 (filed January, 1985).

Conclusion

For the above reasons, this Court should grant this petition for certiorari or summarily reverse with instructions for the Delaware Supreme Court to determine if the Confrontation Clause error was harmless. Alternatively, this petition should be held pending a decision in *United States v. Bagley*, No. 84-48.

February, 1985

Respectfully submitted,

Gary A. Myers
Counsel of Record
Charles M. Oberly, III
Attorney General of the State of Delaware
John A. Parkins, Jr.
Chief, Appeals Division
Loren C. Meyers
Deputy Attorney General
DELAWARE DEPARTMENT OF JUSTICE
1. S. Race Street
P.O. Box 373
Georgetown, DE 19947
(302) 856-5353

APPENDIX

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

ROBERT E. VAN ARSDALL,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 346, 1982
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee,	)	
	)	
and	)	
	)	
GANNETT COMPANY, INC.,	)	
	)	
Intervening	)	
Appellee.	)	

Submitted: September 10, 1984
Decided: November 19, 1984

Before McNEILLY, MOORE, and CHRISTIE, Justices.

Upon appeal from Superior Court. Reversed and remanded for a new trial.

William N. Nicholas (argued), Dover, and John R. Williams (argued) of Prickett, Jones, Elliott, Kristol & Schnee, Dover, for Appellant.

Gary A. Myers (argued), Deputy Attorney General, Georgetown, for Appellee.

Louis J. Finger, of Richards, Layton & Finger, Wilmington, for Intervenor.

CHRISTIE, Justice:

This case involves an appeal from a conviction in the Superior Court, Kent County, of murder first degree and possession of a deadly weapon during the commission of a felony.

The defendant, Robert Van Arsdall, was accused of murdering Doris Epps in a friend's apartment, shortly after the conclusion of an all day New Year's Eve party on December 31, 1981. The party, which lasted from approximately 11:00 a.m. to 12:00 midnight, took place in and between two adjacent apartments, one of which was occupied by Daniel Pregent and the other by Robert Fleetwood. It is apparent from the testimony given at trial that various persons had attended the party on and off over the course of the day, and that the defendant was one of those transient guests. The defendant testified that he had stopped in at the party for two brief periods in the late afternoon and early evening; he then returned to the party for a third time at about 11:30 p.m.

The evidence indicated that as the evening wore on, the party lost much of its jovial spirit. Pregent had an altercation with a female guest at one point and had to be restrained. The victim of the homicide, Doris Epps, had passed out by 10:30 p.m., perhaps as a result of excessive use of alcohol. She had been placed in a convertible sofa bed in the living room/bedroom area of Pregent's apartment. A short time later, a second altercation of some kind occurred, this time in Fleetwood's apartment, and this prompted Fleetwood to "close" the party in his apartment to everyone except his two friends, Alice Meinier and Mark Mood.

When the defendant returned to the party for the third time, he entered Pregent's apartment through a back entrance shortly after 11:30 p.m. At that time, only Pregent and the unconscious Doris Epps were present.

Fleetwood testified that shortly before going to sleep in his own apartment, he walked across the hall and looked into Pregent's apartment where he had seen the defendant sitting on the sofa bed next to Pregent's feet. Meinier testified that she, too, walked across the hallway in order to find out what time it was by looking at Pregent's clock, which was located in his kitchen. She stated that when she did this it was 11:53 p.m., and that she saw nothing unusual in the dark living room area of the apartment. Meinier went on to testify that about one hour later, the defendant came to Fleetwood's apartment with blood on his hands and shirt, holding a long, bloody knife.

The police were called and when they arrived a few minutes later, they found Epps' body lying in a pool of blood on the kitchen floor of Pregent's apartment. Pregent was asleep on the blood-splattered sofa bed in his darkened living room.

Both defendant and Pregent were subsequently arrested and charged with murder first degree. Defendant was tried first. The State relied on the circumstantial evidence outlined above. The defendant took the stand and denied that he took any part in the killing. He testified that he saw Pregent stabbing the victim. He was nevertheless found guilty by the jury. The State did not seek the imposition of capital punishment. Pregent did not testify at Van Arsdall's trial. Pregent was tried later and was found not guilty.

On appeal, the defendant makes many arguments. We find reversible error in one of the trial court's important rulings and, therefore, reverse the defendant's conviction and remand the case for a new trial.

I

The defendant argues that it was error for the trial court to limit his cross-examination of three prosecution witnesses. In the first instance, the defendant contends that the trial court erred by ruling that he could not ques-

tion Robert Fleetwood about Fleetwood's prior arrest and about a previous occasion on which Fleetwood had been questioned by a detective. The defendant contends that this ruling denied him the opportunity to expose Fleetwood's possible bias in testifying for the State and also deprived defendant of his right to confront the witnesses against him. U.S. Const. amend. VI; Del. Const. art. I, §7.[1] The defendant argues that the language this Court employed in *Weber v. State*, Del. Supr., 457 A.2d 674 (1983), makes it clear that we must reverse his conviction. We agree.

It is well established that the bias of a witness is subject to exploration at trial and is "always relevant as discrediting the witness and affecting the weight of his testimony." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) [quoting 3A J. Wigmore, *Evidence* §940, at 775 (Chadbourn rev.ed. 1970)]; *Weber*, 457 A.2d at 680. Moreover, "cross-examination on bias is an essential element of the constitutional right of confrontation." *Wintjen v. State*, Del. Supr., 398 A.2d 780, 782 (1979). In *Weber*, we acknowledged the accused's right to a "certain threshold level of cross-examination," and observed that the presumption in favor of cross-examination requires the trial judge to permit inquiry into "any acts, relationships, or motives reasonably likely to create bias." *Weber*, 457 A.2d at 680, 682.

The trial court may not foreclose a legitimate inquiry into a witness' credibility before the defendant's Sixth

1. The U.S. and Delaware Constitutions provide in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend VI.

and

> "In all criminal prosecutions, the accused hath a right . . . to meet the witnesses in their examination face to face . . . ." Del. Const. art. I, §7.

Amendment confrontation right has been adequately met. *See Weber*, 457 A.2d at 681-682; *United States v. Meyer*, 556 F.2d 245, 250 (5th Cir. 1979). In *Weber* this Court set forth a two-part test for determining whether limitations imposed by the trial judge on a relevant line of cross-examination violate the accused's right of confrontation. Specifically, we said that we would look to the cross-examination permitted to ascertain (1) if the jury were exposed to facts sufficient for it to draw inferences as to the reliability of the witness and (2) if defense counsel had an adequate record from which to argue why the witness might have been biased. *Weber*, 457 A.2d at 682. *See, United States v. Summers*, 598 F.2d 450, 461 (5th Cir. 1979). Clearly, the trial court's decision to prohibit *all* questioning concerning the dismissal of charges against Fleetwood for being drunk on the highway prevented the jury from considering facts from which it could have drawn inferences about Fleetwood's testimonial reliability. Under the circumstances, the defense had a right to introduce such testimony.

The State correctly points out that "some topics will be of marginal relevance, and that the trial court in such situations may properly prohibit cross-examination or allow only limited questioning." *Weber*, 457 A.2d at 682. We note, moreover, that under some circumstances a judge may exclude evidence in instances such as these even though bias or prejudice might have been disclosed. *Weber*, 457 A.2d at 682. *See Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The State contends that the defendant's proposed lines of inquiry were only marginally relevant, and that the trial court properly ruled against such cross-examination. However, under the circumstances present in this case, we cannot agree. The question of bias was an important issue before the court and the excluded evidence was central to

that issue.[2] We conclude that the trial judge abused his discretion when he ruled that defendant could make no inquiry into Fleetwood's possible understanding that charges pending against him were dismissed in exchange for his cooperation with the State.[3]

The State next argues, however, that even if the defendant was deprived of his confrontation right, such error was harmless because Fleetwood's basic testimony was cumulative in nature and unimportant. We noted in *Weber* that "the standards used to determine if there is a violation of the confrontation clause in the first instance are similar, if not identical, to those used in deciding if the error was harmless." *Weber*, 457 A.2d at 683. In *Reed v. United States*, D.C. App., 452 A.2d 1173, 1176-77 (1982), the court stated a test consistent with *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) and with our ruling in *Weber* for determining whether a violation of the confrontation clause is harmless:

---

2. On voir dire, Fleetwood revealed the following:
Q [Mr. Reed]: "What was your understanding of why the charge was dropped?"
A [Fleetwood]:"Well, I did understand that I did feel that you wanted me to make sure that I knew what I was talking about, and I do feel that you wanted to make sure I had my story together before coming in here. So that is why I did feel that it was dropped."
* * * * *

3. Although we need not and do not consider whether the trial court erred in preventing the defendant from cross-examining Fleetwood about a previous occasion on which Fleetwood had been questioned by a detective in a separate murder investigation, we note that the presumption in favor of cross-examination requires that an accused be given some latitude to search for agreements or understandings, even where no actual or communicated deal exists. *See, Greene v. Wainwright*, 634 F.2d 272 (5th Cir. 1981); *United States v. Mayer*, 556 F.2d 245 (5th Cir. 1976); *Burr v. Sullivan*, 618 F.2d 583 (9th Cir. 1980).

> Where the record reflects a curtailment of a requested line of bias cross-examination *in limine*, so that the jury is unable to perform its fact-finding function in inferring bias from the testimony as a whole, we will assess cross-examination errors by a per se error standard. If, however, the trial court has permitted *some* cross-examination so that the jury has sufficient information from which to infer bias (should it so choose), this Court will evaluate error by application of the harmless constitutional error test of *Chapman v. California, supra* [386 U.S. 18,87 S.Ct. 824, 17 L.Ed.2d 705 (1967)]. To hold harmless such error in curtailing constitutionally protected cross-examination, it must be clear beyond a reasonable doubt " . . . that the defendant would not have been convicted without the witness' testimony . . . ." [Citing *Springer v. United States*, D.C. App., 388 A.2d 846, 856 (1978)].

We hold that under the circumstances of this case, where the defendant was subjected to a blanket prohibition against exploring potential bias through cross-examination, the trial court committed a per se error. Consequently, the actual prejudicial impact of such an error is not examined and reversal is mandated. *See Webb v. United States*, D.C. App., 388 A.2d 857, 858 (1978).

The defendant also argues that it was error for the trial court to limit his cross-examination of Alice Meinier. He contends that his right to cross-examination encompasses an absolute right to question a witness about his or her address. We find his argument to be without merit. It is clear for the record that the defendant sought to elicit information not about Meinier's place of residence, but rather information about with whom she had been residing. *Cf. United States v. Harris*, 501 F.2d 1, 9 (9th Cir. 1974) (requiring cross-examinaiton about an address). The trial court did not err in ruling against such

questioning since it apparently thought that counsel's main purpose was to subject the witness to harassment or humiliation. *United States v. Harris*, 501 F.2d at 9.

Finally, we find no error in the trial court's decision to limit the defendant's cross-examination of detective Bowers. The defendant claims that the State, in its direct examination, implied that a thorough police investigation at the murder scene led to defendant's arrest. Defendant now argues that the State, having raised the issue, opened itself to cross-examination on this point, and that the trial court abused its discretion in ruling that defendant could not question the detective on this matter. We do not agree. Assuming that the defendant's inquiry was directed at the issue of the thoroughness of the police investigation, the court could have reasonably concluded that such questioning was collateral because Alice Meinier's statement to the police and the blood found on the defendant's clothing justified the arrest.

II

The defendant next raises several arguments which address the propriety of the trial court's evidentiary rulings. Although none of the alleged errors amounts to reversible error, we discuss some of the issues presented because there will be a new trial.

Initially, defendant contends that the trial court abused its discretion in admitting various exhibits into evidence. The defendant maintains that the admission of the victim's blood-stained clothing and, at least, one "gruesome" photograph of the victim exposed the jury to evidence which was highly prejudicial and inflammatory. Defendant insists that any probative value of such evidence was outweighed by the prejudice involved. D.R.E. 403. In addition, the defendant claims that the admission of several articles of his clothing and numerous photographs of the victim were unnecessary and cumulative. We hold that these arguments are without merit.

The trial court has wide discretion in admitting into evidence photographs of injuries to a victim. *Dickens v. State*, Del. Supr., 437 A.2d 159, 162 (1981). The court's discretion in admitting a victim's clothing is equally broad. *See Longoria v. State*, Del. Supr., 168 A.2d 695, 703, *cert. denied*, 368 U.S. 10 (1961). *Cf. Dutton v. State*, Del. Supr., 452 A.2d 127 (1982) (victim's remains not necessarily excludable.) The trial court ruled that the material and probative value of the evidence outweighed any prejudicial effect it might have. This Court cannot say that the trial court abused its discretion.

Similarly, the defendant's claim that the introduction of his clothing was irrelevant is specious. *See, Dickens v. State*, 437 A.2d at 163.

Finally, it must be remembered that D.R.E. 403 authorizes the trial judge to exclude only the needless presentation of cumulative evidence, and the court had wide discretion to determine whether the evidence in question was needlessly cumulative.

The defendant also asserts that it was error for the trial court to permit the prosecution to place into evidence various articles which the defendant wished to introduce as defense exhibits. We find no merit to defendant's argument.

The trial court has broad authority in determining the mode and order of presenting evidence, and its choice can be overturned only if it infringes on a constitutional right or constitutes an abuse of discretion. D.R.E. 611(a); *Geders v. United States*, 425 U.S. 80, 86, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976). It was not an abuse of discretion to refuse to allow the defendant to place exhibits into evidence during the prosecution's case-in-chief. *See State v. Washington*, La. Supr., 292 So.2d 234, 237-38 (1974).

The defendant next argues that the trial court abused its discretion in admitting into evidence transcripts of tape

recordings. The defense maintains that since the recordings themselves were the "best evidence", the additional admission of the transcripts of the recordings violated the"best evidence" rule. D.R.E. 1001-1002. The defendant relies on dicta contained in the case of *Bonicelli v. State*, Okla. Ct. App., 339 P.2d 1063, 1065 (1959). However, most courts which have addressed this issue have rejected the position the defendant here takes, especially where, as here, the defense counsel "agreed" that the transcripts were fair and accurate reports of what was said. *See United States v. Turner*, 528 F.2d 143, 167-68 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975); *United States v. Carson*, 464 F.2d 424, 436-37 (2d Cir. 1972). We reject defendant's contention.

III

Defendant contends that the trial court's failure to sequester the chief investigating officer, or alternatively, to require the officer to testify first, was an abuse of discretion, since the officer had a chance to hear the testimony of other witnesses — including defense witnesses — and he had an opportunity to tailor or fabricate his subsequent testimony accordingly.

However, it is clear in Delaware that sequestration is discretionary with the trial judge, *Holmes v. State*, Del. Supr., 422 A.2d 338, 340 (1980), and that it is often deemed proper to exempt the chief investigating officer from a sequestration order. *Grace v. State*, Del. Supr., 314 A.2d 169, 170 (1973). It follows that it is also within a court's discretion to refuse to compel the officer to testify first and to allow the prosecution to present its evidence in chronological fashion. *See United States v. Butera*, 677 F.2d 1376, 1380-81 (11th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 735 (1983).

IV

The defendant argues that the trial court erred in permitting Dr. Lee to give an expert opinion when his testimony appeared to be speculative in nature. The defendant's position is that Dr. Lee could not have given an informed opinion as to the movement of the victim's body because he lacked knowledge of a buttock wound, and that the doctor's use of words, such as "could", "possibly", and "maybe" indicate that he was engaged in speculation. We find defendant's argument to be without merit. We note that on cross-examination, the doctor testified that the conclusions he had reached concerning the movement of the victim's body would not have changed had he been aware of the buttock wound. We also conclude that the doctor's choice of words did not indicate that his conclusions were based on speculation. *See Air Mod Corp. v. Newton*, Del. Supr., 215 A.2d 434, 438 (1965).

V

The defendant next argues that the trial court abused its discretion in refusing to consider an affidavit he presented in a pretrial suppression hearing. This argument is without merit. The court did not abuse its discretion in refusing to consider the affidavit in this case since the defendant refused to be cross-examined on the contents of that affidavit.

VI

Defendant contends that the trial judge's instructions to the jury were erroneous in several respects.

Defendant argues that the trial court committed reversible error in giving the jury an accomplice instruction which was based on the possibility that the offense may have been committed by Daniel Pregent, and that the defendant may have been his accomplice. Defendant

insists that there was insufficient evidence to warrant such a charge. We do not find the instruction to be erroneous. However, if there was error, it was clearly harmless error. *Barnes v. State*, Del. Supr., 352 A.2d 409, 410-411 (1976).

The defendant argues that the trial court erred in instructing the jury to disregard defense counsel's comment inclosing that "circumstantial evidence is the weakest form of evidence." The law, however, assigns no lesser degree of probity to circumstantial evidence. *Holden v. State*, Del. Supr., 305 A.2d 320, 322 (1973). Hence, the trial court was correct when it instructed the jury to disregard defense counsel's erroneous statement.

The defendant says that the court's charge to the jury lacked sufficient factual detail. In the absence of any indication by the defendant suggesting the omission of specific and necessary factual details, the general instruction which traced the statutory language of the criminal statute is deemed to be adequate to inform the jury of the factual issues to be resolved. *Daniel v. McAllister*, 631 F.2d 1256, 1260 (5th Cir. 1980), *cert. denied*. 452 U.S. 907 (1981). We find no error in what the trial court did in this respect.

VII

The defendant argues that the trial judge erred in acting as one of the drivers who took the jurors to their overnight accommodations outside defendant's presence and outside the presence of legal counsel. The defendant claims that this *ex parte* contact infringed upon the constitutional commands of "presence", assistance of counsel, and jury impartiality. We conclude that the limited personal contact between judge and jury should have been avoided but it was harmless beyond a reasonable doubt, as that phrase is used in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The defendant goes on to assert that the trial court's "limited voir dire" of the jurors the next morning did not meet the requirements of the type of post-trial hearing which appears to have been mandated by the United States Supreme Court in *Rushen v. Spain*, ___ U.S. ___ , 104 S.Ct. 453 (1983). (The *Rushen* case involved an *ex parte* communication between the trial judge and a juror as to an incorrect answer the juror had given to a voir dire question.) It is clear, however, that a post-trial hearing is not required in all instances. Although the Supreme Court found that a post-trial hearing was appropriate in that case, the court went on to state that "[t]he adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred." *Rushen*, 104 S.Ct. at 456.

In the case at bar the trial judge simply drove some of the jurors to their lodgings. The next day, at the defendant's request, the jurors were questioned about their contact with the judge. The jurors reported that they had had no communication with the judge concerning the case. Under the circumstances, the voir dire was adequate.

The court below committed no reversible error in driving the jury to its lodgings or in its later voir dire. However, such contact with jurors should be avoided in the future.

VIII

The defendant next makes a series of arguments objecting to the jury selection process. The defendant's basic position is that the use of voter registration lists as the sole source for the selection of potential jurors was inadequate to assure a representation from a fair cross section of the community. 10 *Del.C.* § 4501; U.S. Const. amend. VI; Del. Const. art I, § 7.[4] Ultimately, the de-

4. 10 *Del.C.* § 4501 provides in pertinent part:
"It is the policy of the State that all litigants in state courts

fendant attacks three statutory provisions in support of his contention.

(a) The defendant initially asserts that the exclusive use of voter registration lists is improper in Kent County because of the large number of individuals employed at Dover Air Force Base who may be registered to vote in other states, and thus, would not be called to serve on a Kent County jury. In effect, the defendant also challenges 10 *Del.C.* § 4504(b)(6)(i),[5] which exempts military personnel from jury service. The defendant argues that exempting the population at the military facility prevents the venire from having a fair cross section of the community. We find the defendant's argument unpersuasive.

In *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979) the United States Supreme Court held that:

> "[I]n order to establish a *prima facie* violation of the fair cross section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the under-representation is due to a systematic exclusion of the group in the jury selection process."

NOTES *(Continued)*

entitled to trial by jury shall have the right to . . . juries selected at random from a fair cross section of the county wherein the court convenes."

We find that the policy of § 4501 is embodied in the due process requirement of the U.S. and Delaware Constitutions. Thus, the defendant's failure to comply with the procedural requirements of 10 *Del.C.* § 4508(a), (d) does not pre-empt his right to challenge any provision dealing with jury selection. *See United States v. Hawkins*, 566 F.2d 1006, 1014 (5th Cir.), *cert. denied*, 439 U.S. 848 (1978).

5. 10 *Del.C.* § 4504(b)(6)(i) states that the jury selection plan:
". . . shall provide for exemptions of . . . (i) Members in active service in the Armed Forces of the United States. . . ."

Moreover, to satisfy the "distinctive" requirement, a particular group must have a unique outlook or "perspective on human events" not shared by other segments of the community, *see Taylor v. Louisiana*, 419 U.S. 522, 532, n.12, 95 S.Ct. 692, 698, n.12, 42 L.Ed.2d 690 (1975), and this distinctive requirement must exist as to a substantial number of people. *Duren*, 439 U.S. at 370. Thus, the statutory exemption for military personnel would violate the fair cross-section requirement only if the defendant can show that those in the military service who have not registered to vote in Delaware have a unique perspective not shared by other members of the community. *See Walker v. State*, Alaska Supr., 652 P.2d 88, 92-93 (1982); *Taylor*, 419 U.S. at 534. Defendant has not met this burden.

We also note that the Supreme Court has upheld "exemptions from jury service to individuals . . . engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare." *Taylor*, 419 U.S. at 534. It seems clear that occupations related to national defense are critical to the community's welfare. *See* 28 U.S.C. § 1863(b)(6)(i),[6] which is the federal counterpart to 10 *Del.C.* § 4504(b)(6)(i).

(b) The defendant next makes two separate, but closely related challenges. He argues that statutory disqualification from jury service of persons residing in the county for less than one year, 10 *Del.C.* § 4506(b)(1), and persons accused or convicted of serious crimes, 10 *Del. C.* § 4506(b)(5), deprives him of due process and equal protection of the laws. U.S. Const. amends. V, VI,

6. 28 U.S.C. § 1863(b)(6)(i) (Supp 1984) reads in pertinent part:
"The [jury selection] plan shall provide for the exemption of the following persons: (1) members in active service of the Armed Forces of the United States. . . ."

XIV. Del. Const. art. I, § 7.[7] We will address each of the defendant's claims:

Due Process: Most courts facing challenges of this type of juror residency requirement have held that newer residents are not a "distinctive" or "cognizable" class. *United States v. Maskeny*, 609 F.2d 183, 192 (5th Cir.), *cert. denied*, 447 U.S. 921 (1980); *United States v. Perry*, 480 F.2d 147, 148 (5th Cir. 1973). Indeed, such "group's membership — cutting across economic, social, religious, and geographic lines — changes day to day, creating lack of real commonality of interest among the newly migrated." *Adams v. Superior Court of San Diego County*, Cal. Supr., 524 P.2d 375, 378 (1974). The defendant, in urging us to adopt Justice Mosk's dissenting opinion in *Adams*, argues that newer residents are an identifiable and ascertainable group, and are therefore, cognizable. *See Adams*, 524 P.2d at 383 (Mosk, J., dissenting).

We cannot accept the defendant's position. Even if we assume that newer residents are an identifiable and ascertainable group, evidence of such group's "distinctiveness" is lacking. The United States Supreme Court, in recent decisions, has found that a distinct group in the community possesses a unique outlook or "perspective on human events." *See Taylor v. Louisiana*, 419 U.S. at 532, n.12. The defendant has not shown that newer res-

7. The relevant provisions provide in pertinent part:

"... [that] any person [is] qualified to serve on ... juries in Superior Court unless he:

(1) .. has [not] resided for a period of one year within the county ... or ...

(5) Has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than 1 year ...." 10 *Del.C.* § 4506(b)(1), (5).

and

"No State shall make or enforce any law which ... den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

idents possess a common viewpoint not shared by other segments of the community. Furthermore, he has failed to establish that newer residents exist in such substantial numbers that, assuming a common perspective, the remaining pool of potential jurors would be unrepresentative of the community. *See Taylor*, 419 U.S. at 534; *Duren v. Missouri*, 439 U.S. at 370.

For similar reasons we find that the defendant has failed to demonstrate that exclusion of the class of persons then accused of, or previously convinced of serious crimes, limits the venire as a fair cross section of the community. Although it is true that members of this group share the common experience of being or having been in conflict with the authorities, the defendant has not shown that the perspective gained from such an experience is absent in other segments of the community, *see, Rubio v. Superior Court of San Joaquin Cty.*, Cal. Supr., 593 P.2d 595, 598-99 (1979), or alternatively that exclusion of such group would pose [a] substantial threat that the remaining pool of jurors would not be representative of the community." *Taylor*, 419 U.S. at 534.

We hold that the one-year residency requirement of §4506(b)(1) and the exclusion from jury service of persons who have serious criminal charges then pending against them or have been convicted of serious crimes under §4506(b)(5), do not deprive the defendant of due process of law under the United States and Delaware Constitutions. U.S. Const. amends, VI, XIV; Del. Const. art I, §7.

Equal Protection: The defendant also claims that the provisions of §4506(b)(1) and (5) deprive him of equal protection of the laws. U.S. Const. amend. XIV. In the first instance, we find that the defendant has no standing to challenge the residency requirement under the equal protection clause. It is clear from the record that the defendant is actually asserting a claim *on behalf* of the newer resident class. Because he is not a member of the excluded class, the defendant has no standing to make an

equal protection claim, unless he can show that he has been personally injured by the exclusion of newer residents from the jury list. *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972). Since the defendant's "injury" is predicated on his claim that the venire was not composed of a fair cross section of the community, our resolution of that preliminary issue disposes of any equal protection claim.

The defendant's challenge to the exclusion of persons presently accused or previously convicted of serious crimes presents a different situation, since this defendant is a member of this arguably cognizable class. We conclude, however, that the exclusion of such persons from jury service does not deprive the defendant of equal protection of the law.

The defendant does not claim that the classification in question is "suspect" (as such classifications are primarily used in cases involving unconstitutional discrimination), and the defendant concedes that jury service is not a "fundamental right." It follows that the exclusion does not violate equal protection if it bears any rational relationship to some legitimate State objective. *Lowicki v. Unemployment Insurance Board*, Del. Supr., 460 A.2d 535, 538-39 (1983). *See Rubio v. Superior Court of San Joaquin Cty.*, 593 P.2d at 600. The defendant argues that the State could have no legitimate interest in excluding persons accused of criminal acts who remain presumptively innocent, and that §4506(b)(5) is unconstitutionally broad. We disagree. The State has an obvious and compelling interest in preserving the right to a fair trial by an impartial jury. The legislature could reasonably determine that persons presently accused or previously convicted of serious crimes, as present or past adversaries of "the system," may be biased in favor of a criminal defendant, whom is seen as a fellow victim of the system. *See Rubio*, 593 P.2d at 600. The State could also reasonably conclude that jury service would interfere with an accused's preparation of his own defense, and conversely,

that an accused's preoccupation with his own possible trial would interfere with his duties as a juror.

IX

The defendant next claims that the trial court did not take adequate steps to assure the jury's impartiality. He contends that the trial court abused its discretion in rejecting five requested jury voir dire questions, which dealt with racial bias, and in failing to provide reasons for its denial of these and seventy-three other proposed questions.[8]

It is well established that the trial court's discretion on voir dire is restricted only by essential demands of fairness. *Hooks v. State*, Del. Supr., 416 A.2d 189, 195 (1980); *Shields v. State*, Del. Supr., 374 A.2d 816 (1977), *cert. denied*, 434 U.S. 893, 98 S.Ct. 271, 54 L.Ed.2d 180 (1977).

A trial judge is required to inquire into the issue of racial bias when requested to do so, and he has a duty to present to the prospective jurors an appropriate question or questions, submitted by defense counsel, if such question or questions are designed to reveal such bias. *Hooks*, 416 A.2d at195-96. *See Preston v. State*, Del.Supr., 306 A.2d 712, 716 (1973). We conclude, however, that the questions here proposed dealing with racial bias were in-

8. The proposed questions relating to racial bias read as follows:
   69. Do you have any personal or professional relationships with blacks?
   70. Do you think that black people have the same values and standards as other members of society?
   71. Do you feel that there is any difference between black people and white people?
   72. Do you think that black people have a more difficult time getting along in contemporary American society?
   73. Have you ever had any dealings or experiences with black people that might make it more difficult for you to sit in impartial judgment on this case knowing that the alleged victimwas black?

appropriate, since they did not address the possibility of racial prejudice against the defendant, who is a white person, but instead addressed the possibility of prejudice against the black victim.

We find no error in the failure to give the other voir dire questions which were requested.

The defendant also indicates that the voir dire was procedurally inadequate to determine the effect of pretrial publicity upon potential jury members. The defendant's claim is clearly without merit. The trial court's procedure of initially asking the venire in general whether they had heard or read anything about the case, and then questioning individually those who responded affirmatively, was proper and reasonably calculated to discover bias. *See United States v. Chagra,* 669 F.2d 241, 253-54 (5th Cir.), *cert. denied,* ____ U.S. ____, 103 S.Ct. 102 (1982); *United States v. Barton,* 647 F.2d 224, 230 (2d Cir. 1981).

For corresponding reasons we find that the measures taken to assure the jury's isolation from publicity during the trial were adequate. Under the guidelines set forth in *Smith v. State,* Del. Supr., 317 A.2d 20, 23 (1974), the judge admonished the jurors not to read media accounts at the end of each trial day, and inquired of the jurors, at the beginning of each subsequent day, whether they had heard or read anything about the case. No juror ever responded affirmatively. We reject the defendant's argument that the trial judge, should have admonished the media to adhere strictly to the Bar-Bench Press Declaration of Delaware.

X

The defendant next argues that the trial court erred in denying defendant's motion for funds to employ a private investigator. The defendant maintains that a particular expert-investigator was needed to counteract the State's forensic evidence and to perform various other

investigative functions. Since he had made a record of why an investigator was desired, the defendant argues he was constitutionally entitled to one and that the trial court's decision not to accede in his request deprived defendant of his right to effective assistance of counsel and equal protection of the law. U.S. Const. amends. VI, XIV. Del. Const. art. I, §7.

The decision to grant or deny funds for investigative services is within the sound discretion of the court. *See State v. Akyana,* Me. Supr., 456 A.2d 1255, 1262 (1983). An indigent defendant is not entitled to have investigative services provided by the State, unless he is able to show that such services are reasonably necessary for the preparation of an adequate defense. *United States v. Davis,* 582 F.2d 947, 951 (5th Cir. 1978), *cert. denied,* 441 U.S. 962 (1979). The trial court's ruling will not be overturned on appeal unless there is a clear and convincing showing of substantial prejudice as a result of the denial of funds for investigative services. *Mason v. Arizona,* 504 F.2d 1345, 1353, 1355 (9th Cir. 1974), *cert. denied,* 420 U.S. 936 (1975).

In this case defendant has failed to demonstrate such prejudice as would justify reversal of the trial court's decision. He has not identified any reasonably necessary services of an investigator which would have been material to the defense of this murder charge. Thus, there is no realistic suggestion that the particular investigator sought would have been able to "counteract" the State's evidence. And in any event, the defendant has not shown that it would have been impracticable for his counsel to conduct the proposed investigation. *See, Mason,* 504 F.2d at 1353. Under these circumstances, we cannot infer that the purported investigative services were necessary and conclude that the trial court's ruling did not deprive the defendant of effective assistance of counsel.

We also hold that defendant in this case has not shown that the State's failure to provide an investigator deprived him of equal protection of the laws. The de-

fendant cannot reasonably claim that he has a general "fundamental right" to investigative services and, therefore, any disparity in the availability of investigative resources to indigents represented by the Public Defender as opposed to indigents represented by appointed counsel constituted nothing more than harmless error in this case. We note, however, as a general proposition, that where a reasonable need is clearly demonstrated, the State must provide the same ancillary services to those indigent persons represented by court appointed attorneys as it provides to those represented by the Public Defender.

XI

We have been requested by defendant and by the intervening newspaper publisher to review the propriety of the standards applied by the trial court in denying the defendant's motion to close all pretrial proceedings to the public and press.[9] Under the present circumstances we decline to do so.

We conclude that the defendant has failed to establish that he was prejudiced by either the standards employed by the trial court in its evaluation of defendant's motion or by the subsequent pretrial publicity. There is no indication that defendant's right to a fair trial was jeopardized by the dissemination of any information disclosed in pretrial proceedings. Under the circumstances, it is unnecessary for the Court to specify which standard the trial court should have applied. *See United States v. Civella*, 648 F.2d 1167 (8th Cir.), *cert. denied*, 454 U.S. 867 (1981).

* * * * *

9. Defendant urges this Court to adopt the constitutional balancing test used by the majority of the Supreme Court in *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). The intervening newspaper publisher contends that the three-part formula used by the trial court is the proper standard of review.

The judgments and convictions are set aside, and the case is returned to Superior Court for a new trial.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

ROBERT E. VAN ARSDALL,	§	
	§	
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	No. 346, 1982
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: December 6, 1984
Decided: December 12, 1984

Before McNEILLY, MOORE, and CHRISTIE, Justices, constituting the Court en banc.

ORDER

This 12th day of December, 1984, it is ordered that appellant's motion for rehearing en banc is

DENIED.

BY THE COURT:

/s/ ANDREW D. CHRISTIE
Justice

APPENDIX C

Relevant Delaware Statutory Provisions

11 Del. C. §636 (1979). Murder in the first degree

(a) A person is guilty of murder in the first degree when:

(1) He intentionally causes the death of another person.

11 Del. C. §1447 (1979). Possession of a deadly weapon during commission of a felony

(a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony.

11 Del. C. §271 (1979). Liability for the conduct of an other — Generally.

A person is guilty of an offense committed by an other person when:

. . . .

(2) Intending to promote or facilitate the commission of the offense he:

. . . .

b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it.

21 Del. C. §4149 (1981). Walking on highways under influence of drugs or liquor.

No person shall walk or be upon a highway of this State while under the influence of intoxicating liquor and/or narcotic drugs to a degree which renders himself a hazard.